Nos. 62 and 14

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellants,

—v.—

JOHN KELLY, *et al.*,

Appellees.

MAE WHEELER, *et al.*,

Appellants,

—v.—

JOHN MONTGOMERY, Director of the State Department of Social Welfare, and RONALD BORN, General Manager of the San Francisco City and County Department of Social Services,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF IN REPLY TO THE UNITED STATES AS *AMICUS CURIAE*

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ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF IN REPLY TO THE UNITED STATES AS *AMICUS CURIAE*

Appellees in No. 62 and Appellants in No. 14 jointly submit this brief in reply to the Brief for the United States as *Amicus Curiae,* in which the Government now argues that the currently applicable H.E.W. policies, said to represent the "expert judgment of the Secretary" on "cogent policy considerations," Gov. Br. 23, 24, should control the constitutional standards for termination of welfare payments. This position stands in sharp contrast with, at times in opposition to, the exposition of the United States as *amicus curiae* below in *Goldberg* v. *Kelly* of the very same federal regulatory policies invoked here and of their relevance to constitutional standards. We have therefore reprinted in full the Government's earlier exposition in the Appendix to this Reply.[1]

I.

Let us first put aside the Government's intimation that this constitutional attack on state administrative practices draws into question, in some undefined manner, the "fair hearing" provision of the Social Security Act or the currently applicable H.E.W. regulatory policy. The constitutional validity of neither is under review in this Court. The challenged terminations of public assistance benefits were effected by state and local administrators under state law and administrative policies. No federal statute or regulation requires (or, as we shall establish, encourages) such terminations without a hearing. It is

[1] The brief *amicus curiae* of the United States in *Goldberg* v. *Kelly* was submitted to the three-judge district court in October, 1968, in response to that court's request to the Attorney General for the views of the United States.

state administration of these programs generally which entails the eligibility problems and abuses necessitating constitutional accountability. As the United States said and reiterated in its *amicus* brief below:

> "As for the AFDC program, whether the plaintiff-clients or the defendant-State and local agency should prevail in this case, it appears, as will be discussed below, that there will be no violation of Federal requirements." Reply App. 2a.

Our attack on state regulations does not question the constitutionality of the "fair hearing" provisions of the Social Security Act, 42 U.S.C. §§302(a)(4), 602(a)(4), 1202(a)(4), 1352(a)(4), 1382(a)(4).[2] Although Congress, as is its wont in such procedural matters, did not attempt to define what was "fair" over the entire spectrum of disputes between an applicant or recipient and the agency, no inference may be drawn therefrom.[2a] All that can fairly be said from the statutory command of a "fair hearing" is that Congress intended the customary requirements of fairness embodied in procedural due process to govern welfare hearings. H.E.W. has so interpreted the term in specifying at length the manner in which the states must conduct the hearing. H.E.W. Handbook, Pt. IV, §§6200-6400. H.E.W.'s regulation providing continued federal participation where the state maintains assistance pending the hearing decision, H.E.W. Handbook, Pt. IV, §6500(b), ob-

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[2] These provisions are applicable to state programs for Old Age Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled and Aid to the Aged, Blind and Disabled, respectively.

[2a] In the one instance in which Congress enacted requirements dealing solely with recipients, the Work Incentive Program, it required a hearing prior to withdrawal of aid for refusal to accept employment. 42 U.S.C. §633(g).

viously is premised on an interpretation of congressional intent not inconsistent with a prior "fair hearing."[3]

Moreover, the failure of the currently applicable federal regulations to *require* a prior hearing as a prerequisite to approval of a state plan cannot be construed as a constitutional judgment of the Secretary or a constitutional deficiency in the federal regulations. The H.E.W. procedural regulations at any point in time represent the *minimal* federal requirements for continued funding of a state welfare program. Reply App. 2a. Because of the exceedingly difficult problems of administrative enforcement of federal requirements, cutoff of federal funds to the states being the only sanction, H.E.W. has not taken an expansive view of its statutory powers generally, see *King* v. *Smith*, 392 U.S. 309, 337-38 (1968), or specifically of its vague authority to require "proper and efficient" methods of administration. 42 U.S.C. §§302(a)(5), 602(a)(5), 1202(a)(5), 1352(a)(5), 1382(a)(5).[4] As a result, federal regulatory pol-

[3] The Government alludes to, but does not quite rest upon, a literal reading of "a fair hearing . . . to any individual whose claim for aid . . . is denied" to obliterate any distinction between applicants and recipients of aid. Such a literal reading would contradict H.E.W.'s own settled construction of the statute requiring a "fair hearing" for any agency action adversely affecting an individual's situation, monetary and non-monetary, H.E.W. Handbook, Pt. IV, §6200(b), and also contradict H.E.W.'s interpretation evinced in its prior hearing regulation, which does, after all, implement the statutory "fair hearing" provision. 45 C.F.R. §205.10. This reading would also seemingly require persons terminated to reapply for aid as a prerequisite for the hearing, a practice that H.E.W. has found offensive to the federal act. See *In the Matter of The Conformity of the Louisiana Plan for Aid to Dependent Children Under Title IV of the Social Security Act*, in P. DODYK, CASES AND MATERIALS ON LAW AND POVERTY 131-136.

[4] H.E.W.'s skittishness under this provision may be seen not only in the postponement of the effective date of the prior hearing regulation, but also in a similar postponement of the regulation re-

icy often does not reflect vigorous pursuit of the central purpose of the federal programs—protection of the economic security of individuals in need. Nonetheless, the states are at the very *minimum* obliged to obey the dictates of constitutional standards. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). This is so whether or not these dictates are embodied in the applicable federal regulations. While H.E.W. may not, of course, continue to fund a state program found to be administered in an unconstitutional manner, *Shapiro* v. *Thompson, supra,* like other administrative agencies it does not possess, nor has it assumed, the power to resolve disputed constitutional questions that have not been authoritatively settled in the courts, *Engineers Public Service Co.* v. *S.E.C.,* 138 F. 2d 936 (D.C. Cir. 1943), *judgment vacated and case remanded as moot,* 332 U.S. 788 (1947); *Panitz* v. *District of Columbia,* 112 F. 2d 39 (D.C. Cir. 1940), though it quickly moves to implement such decisions by regulations, *e.g.,* 45 C.F.R. §203.1 (Aug. 8, 1968); 45 C.F.R. §202.3 (May 29, 1969). H.E.W. has not purported to exercise such a power here. As the Government succinctly explained below, "it does not appear that the validity of the Federal policies under either the Federal statute or the Constitution is in issue here." Reply App. 3a. The identical federal policies prevail today.

The standards which were left by Congress for judicial determination in accordance with general principles of procedural due process can mean no less in welfare hearings

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quiring provision of attorneys at fair hearings, 45 C.F.R. §§205.10, 220.25(a) (as amended Aug. 19, 1969), and in the repeal, in effect, of the regulation requiring use of the declaration method to establish eligibility, 45 C.F.R. §205.20 (Jan. 17, 1969).

than in customary administrative decision making. See *Goldberg*, Br. for Appellees 43-45. Among these standards is a well-founded and established distinction between initial denial and revocation of statutory rights, entitlements or privileges, *Gonzales* v. *Freeman*, 334 F. 2d 570, 575 (D.C. Cir. 1964); *Shaughnessy* v. *United States*, 345 U.S. 206 (1953); *Greene* v. *McElroy*, 360 U.S. 474 (1959), which is as valid and recognized in the welfare context as in all others.[8]

II.

The Government's repeated assertion that the Secretary has confronted and acted upon "cogent policy considerations" in opposition to prior hearings cannot be reconciled with the Secretary's official expression of federal policy in

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[8] By hypothesis the recipient of aid is far more dependent and vulnerable than the applicant. The recipient has been found fully eligible, which means without resources or income, employment or opportunity for employment. Such persons must yield whatever resources they come by to the welfare department. They therefore await and expect the bi-weekly check to cover the most immediate of needs—shelter, food and clothing. They are also more exposed to arbitrary treatment stemming from their ongoing personal relationship with a caseworker who administers their subsistence grant.

Federal and state welfare regulations well recognize the difference. H.E.W. makes clear that aid may not be revoked without an administrative finding, supported by clear evidence, of ineligibility, H.E.W. Handbook, Pt. IV, §§6100, 6200; aid, however, may be denied unless the applicant establishes eligibility, H.E.W. Handbook, Pt. IV, §§2000-2999. The statute also provides that the applicant for aid may receive temporary assistance during the 30-day period allowed for investigation of eligibility, 42 U.S.C. §606(e)(1). The terminated recipient deemed ineligible most often may not reapply or receive emergency assistance, but rather must wait the far longer and more uncertain period for the fair hearing to re-establish eligibility. The situations are not, as the Government implies, comparable.

the H.E.W. regulations. These regulations, at the time of the Government's brief below and now, both accommodate and in large part endorse the due process standards relied on here. Upon exposure of the due process claim in these cases, but before any decision, H.E.W. added to the fair hearing provisions authorization for states to continue aid pending the "fair hearing," without loss of federal matching funds. Those funds are now available for all attendant expenditures, including benefits paid during the interim period. H.E.W. Handbook, Pt. IV, §6500(b). As the Government explained below, Reply App. 3a, federal matching provisions often go beyond coercive federal conditions, in order to encourage, hardly discourage, a specified method of administration.[6] This currently applicable federal policy embodied in the matching provision hardly bespeaks a considered administrative judgment that prior hearings impose an unwarranted fiscal burden on federal revenues or create a likelihood that "large numbers of ineligible persons [will or might] enforce a right to receive benefits for substantial periods of time." Gov. Br. 26.[7] At the same time, H.E.W. also expanded from 30 to 90 days the federal matching periods in which the local agency investigates ineligibility and conducts its own termination proceedings. H.E.W. Handbook, Pt. IV, §5514(2). Being at least equal to the 60 days theoretically allowed for the state "fair hearing," the enlarged period certainly accommodates a

[6] Statutory matching provisions are often designed to accomplish the same purpose. New services provided by Congress for AFDC recipients in January 1968 were attended by liberal matching provisions to encourage the states to make use of these measures. 113 Cong. Rec. at 23055, 90th Cong. 1st Sess. (Rep. Mills).

[7] The regulation was promulgated with full appreciation of the tardiness of the state-administered "fair hearing."

hearing procedure before the local agency.[8] To diminish a part of the fiscal incentive for termination followed by a dilatory hearing process, H.E.W. departed from the general rule that aid may be afforded for current needs only, by requiring the states to make retroactive payments where termination is later reversed in the "fair hearing." H.E.W. Handbook, Pt. IV, §§6200(k), 6500(a).

Finally, on January 23, 1969, the Secretary promulgated the prior hearing regulation requiring continuation of aid in, it now appears, all termination cases except challenges to constitutional or statutory validity.[9] Although recently

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[8] Candor requires the observation that all of these time periods have been and remain largely theoretical, save perhaps for the required periodic reinvestigation every three or six months in AFDC, since that entails an entry at that time in the individual case record. The 30-day federal matching rule for acting upon information indicating possible ineligibility was and remains in the judgment of the case unit to decide when such information warrants investigation. That decision is in most cases made at the time of the follow-up and then reflected in the case record. There is no direct federal or state supervision of the line workers and state procedures are usually not designed to interfere with the flow of federal matching funds.

As we have seen, the federal 60-day period for "fair hearings" was and remains exhortatory; there is no federal action, short of defunding the state program, for dilatory "fair hearings." *Goldberg*, Br. of Appellees 59-61.

[9] The regulation appears at *Goldberg*, Br. of Appellees 62. While not an example of clarity to be easily applied by welfare officials, see *Goldberg*, Brief of National Institute for Education in Law and Poverty as *Amicus Curiae* 54 (hereinafter Br. of Institute), and *Goldberg*, Br. of Appellees 56, "issue of fact, or of judgment" has been interpreted by the Government to include all termination disputes except those involving questions of statutory or constitutional validity. The Government would seek to preclude hearings prior to termination "where the claimant challenges only the provisions of law or settled agency policy." Gov. Br. 33. The recipients terminated in these cases do not make such challenges and would be fully satisfied if prior hearings were afforded in all other cases of termination. We agree that questions of statutory

postponed to July 1970, and practically unmentioned in the Government's brief, the regulation was not repealed and *currently* represents a federal policy which the states must plan to implement. It was not an intent to observe the experiment said to be contained in the "substantial modifications" effective July 1968, and certainly not to allow the states time to digest these earlier "modifications," see, *infra*, pp. 10-13, that accounts for the postponement. The delay, as California candidly admits, *Wheeler*, Br. for Appellees 18-19, was a response to the vigorous political opposition of many states to this and other recently promulgated procedural regulations.[10] This political concession to the states cannot properly be considered a part of the administrative expertise of the Secretary; nor is it evidence of any cogent policy considerations considered by him and thus entitled to some deference by this Court. The federal regulatory structure simply does not lend credence to the speculative fears set forth in the Government's brief.

III.

We have dealt with the constitutional deficiencies of the new federal "advance notice" requirement, H.E.W. Handbook, Pt. IV, §2300(d)(5), in our discussions of the California and New York City pre-termination procedures.

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construction or constitutional validity are not appropriate for agency determination and are best settled by resort to the judicial process. Cf. *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, 239 (1968) (Harlan, J. concurring). The issue raised by Mrs. Guzman in *Goldberg* was to the *applicability* of agency policy in her case, *Goldberg*, Br. of Appellees 68, n. 81, and the "inadvertence" noted by the Government was its own, and not the district court's.

[10] See note 4 *supra*, p. 4.

Wheeler, Br. for Appellants 14-23; *Goldberg*, Br. for Appellees 48-50. Several points, however, require clarification. Since both the California and New York City procedures fully comply with this Handbook provision, it is clear that "advance notice of questions" is satisfied by California's and New York's written forms, and the recipient's "opportunity to discuss his situation" before termination is satisfied by New York City's letter of protest procedure. See Reply App. 7a.[11] "Advance notice *of questions*" and the required discussion, an addition to H.E.W.'s detailed pre-existing code governing caseworker investigation of eligibility, H.E.W. Handbook, Pt. IV, §2000, *et seq.*, may occur at any point during the investigation process, not necessarily after investigation, and the procedure does not require a review by a relatively uninvolved official of the caseworker's reasons for termination. As the Government states,

> "It is merely a method of providing notice and screening out those cases which can be resolved by informal procedures." Gov. Br. 13.[12]

Nonetheless, the Government urges that this procedure is a "substantial modification" of prior practice since, the Government continues, formerly local agencies

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[11] Notice need be no more advance than California's three days, though one function of the federal requirement is said to be to eliminate the "element of surprise." Gov. Br. 12.

[12] The California procedure makes clear that it contemplates a discussion between line worker and recipient of eligibility questions and not a review of the reasons for termination. "The opportunity to meet" under the California procedure is "to discuss the entire matter informally for purposes of clarification and, *where possible, resolution.*" Calif. Social Services Manual, Section 44-325.43 [emphasis added]. The New York City procedure goes somewhat beyond this, but the review it offers is predicated on the case record and a possible letter of protest from the recipient.

> "were not required to inform recipients that an investigation or evaluation was underway or to permit them to participate in the process leading to this initial decision." Gov. Br. 10.

This description of prior practice is irreconcilable with a plethora of H.E.W. regulations antedating Section 2300 (d)(5) which mandate in great detail the eligibility information to be provided recipients and their participation in all redeterminations of eligibility (including the special investigations upon report as well as the periodic recertifications).

"At least one" personal interview with the recipient has long been required for all such eligibility investigations and redeterminations. H.E.W. Handbook, Pt. IV, §§2220(5)(b), 2230(5)(c) (March 18, 1966) [now Sections 2200(e)(2), 2300(e)(3)].[13] The Handbook also required that:

> "Applicants and recipients will be relied upon as the primary source of information about their eligibility." Section 2220(5)(a) (March 18, 1966) [now Section 2200(e)(1)].[14]

H.E.W. interpreted this to require the local agency to explain to the recipient what questions remained to be solved,

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[13] We are without access to the regulations of the Department of Health, Education and Welfare prior to March 1966. The substance of the regulations requiring recipient involvement in eligibility determinations certainly predates 1966, however.

[14] The Handbook explains that determinations of eligibility (including, of course, redeterminations) "are based on recognition of the rights and obligations of applicants and recipients to be responsible participants in the process." H.E.W. Handbook, Pt. IV, §2230(5) (March 18, 1966) [now Section 2300(e)(1)].

how *he* can resolve them, and the necessity for resolution.[15] H.E.W. Handbook, Pt. IV, §2230(5)(a) (March 18, 1966) [now Section 2300(e)(5)]. Obviously it has always been understood that client assistance will be sought to dissipate questions of possible ineligibility. Indeed, the agency was obligated "to help [recipients] provide needed information." H.E.W. Handbook, Pt. IV, §2220(5)(a) (March 18, 1966) [now Section 2200(e)(2)]. The role of the recipient was underlined by the requirement that he agree to *all* steps taken by the agency in its investigation of continued eligibility, including contact with third parties who might be in possession of relevant information. H.E.W. Handbook, Pt. IV, §2230(5)(e) (March 18, 1966) [now Section 2300(e)(2)].[16] Where, on the basis of all available information, the agency determined that the requirements for continued eligibility were not satisfied, it was under a duty to notify the recipient of such a determination in writing, and include therein "the reason why he has been determined to be ineligible"; the express purpose of notice was to enable the aggrieved recipient "to express dissatisfaction with the agency action." H.E.W. Handbook, Pt. IV, §2230(5)(d) (March 18, 1966) [now Section 2300(f)].

These requirements certainly are not evidence of the secret process without notice which the Government would have us believe Section 2300(d)(5) was intended to elimi-

[15] "If the individual is reluctant or unwilling to help resolve the question . . . the agency is responsible for considering carefully with him his reasons." H.E.W. Handbook, Pt. IV, §2230(5)(a) (March 18, 1966).

[16] Recipients were to be afforded a "clear interpretation of what information is desired, why it is needed, and how it will be used" before consent is sought to secure information from collateral sources. H.E.W. Handbook, Pt. IV, §2230(5)(c) (March 18, 1966) [now Section 2300(e)(2)].

nate. Except, therefore, as additional exhortation in this prolix code, it is difficult to discern what mandatory change is worked by Section 2300(d)(5). Whatever its purpose, the Section does not represent an experiment requiring substantial modification of prior state practice or necessitating time to adequately assess its effectiveness. See Gov. Br. 16. Pervasive personal contacts between caseworker and client in eligibility redetermination, and an opportunity to discuss eligibility questions with the caseworker have been the rule, not the exception, in welfare administration.[17]

IV.

The Government does not dispute that due process guarantees "against governmental capriciousness and arbitrariness" apply to the distribution of public assistance benefits. Gov. Br. 19-20. But it would justify summary procedure for revocation of such benefits on the legal principle that they are not "property (in the classic sense)," Gov. Br. 29, that they are less "tangible" than OASDI (Social Security) benefits, Gov. Br. 22, and that the interests of eligible recipients in retention of them is "more tentative" than one's interest in "property," Gov. Br. 27. These opaque legalisms will be recognized as variations on the

[17] At least since 1963 New York State has mandated that "in cases where there is indication of changes in need or resources" personal contacts with the recipient "as needed in excess of the minimum . . . shall be made." 18 N.Y.C.R.R. §351.22. The minimum referred to in the case of Home Relief and AFDC clients is once every three months. 18 N.Y.C.R.R. §82.1. The State regulations contemplate the possibility of additional personal contacts even in the case of *periodic* redeterminations (which in the case of Home Relief and AFDC recipients must be made every six months). 18 N.Y.C.R.R. §351.23(a), (b). Also, see, *Goldberg*, Br. for Appellees 33-37, 49-50.

theme of rights and privileges and invocation of the doctrine that the latter are not entitled to traditional constitutional safeguards against revocation. The inappropriateness of this dichotomy, particularly in a benefit program which sought "to introduce . . . a government of laws," Gov. Br. 21, is argued in the principal briefs. *Goldberg,* Br. of Appellees 12-13; *Goldberg,* Br. of Institute 10-17.

But the factors relied on by the Government to classify interests as worthy or unworthy of procedural protection under this dichotomy well reveal its irrelevancy in determining the procedural requirements of due process. The comparison with OASDI is illustrative. Under the right-privilege approach, the controlling difference is found in the financing of OASDI through a trust fund and public assistance through annual congressional appropriations. How the mechanics of financing bears upon the impact and character of the administrative decision, the nature of the individual and governmental interests, the decision-making process or "the type of proceeding involved," *Hannah* v. *Larche,* 363 U.S. 420, 440 (1960), is not explained. There are critical differences between OASDI and public assistance which bear directly upon the procedures that are due, as H.E.W. has itself recognized,[18] but the right-privilege dichotomy simply forecloses inquiry into them.[19]

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[18] The Government's assertion that it would be inconsistent to require prior hearings in the case of AFDC terminations when they are not available in the case of OASDI is curious in view of the contrary position taken by H.E.W., the agency charged with administering both programs. Federal financial participation is now available to those states which choose to provide hearings prior to termination of assistance, H.E.W. Handbook, Pt. IV, §6500(b), and, effective July 1, 1970, all states will be required to do so. 45 C.F.R. §205.10.

[19] As the Government said below, "[t]he OASDI program is not involved in this litigation." Reply App. 2a. Accordingly, the

We do not assert a due process right to a prior hearing in all circumstances of governmental action. Where the question is essentially who is to hold property or benefits pending adjudication, the requirements of due process may vary. But that is not the question we face in welfare programs, the last line of public defense against severe privation. Where welfare aid is erroneously and arbitrarily withdrawn before an opportunity to contest the decision, what is at stake is the brute fact of survival and indeed

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administration of that program, its actual procedures, and the impact of suspension or termination have not been explored in these cases. Some observations about the differences can be made, however.

Eligibility for OASDI is not based on need and beneficiaries can and usually do have resources and other sources of income. *Social Security Programs in the United States*, 20-21, U.S. Dept. of Health, Education and Welfare, Social Security Administration, March 1968. Eligibility is based on objectively verifiable criteria (age, death, family relationship and disability), 42 U.S.C. §§402, 432(c), and once established, is not subject to continuous redetermination. There are no caseworkers in OASDI. Far fewer events affect payment in OASDI than AFDC or OAA, and most all of them are objectively ascertainable and verifiable (*e.g.*, income subject to withholding, 42 U.S.C. §403(b)). The vast majority of terminations or suspensions are based on changes reported by the beneficiary himself. In some circumstances, payments may continue for a specified time beyond the date eligibility is found to cease. Public assistance under the federal programs is available to most OASDI beneficiaries.

Social Security benefits may in some circumstances be suspended upon an administrative finding that there is a danger of overpayment, after notice and a conference between an agency official and a beneficiary. Upon suspension, the beneficiary may request expedited payment or reinstatement upon alleging reasons why he is entitled to the payment. 42 U.S.C. §405(g) and 20 C.F.R. §404.968(a). He may also request reconsideration of the suspension, 20 C.F.R. §404.910. The beneficiary is also entitled to a prompt hearing before a Social Security hearing officer and an appeal to the Social Security administrative appeals counsel. He is then entitled to further review in the United States District Court. The hearing process in OASDI, with judicial review, is not unused. See generally Reply App. 11a-15a.

any effective opportunity to contest the determination. As we have seen in the instant cases, the interim hardships are incalculable and a subsequent hearing largely illusory. Indeed the Government observes that "[w]hile a substantial proportion of 'fair hearings' have in the past led to reversal or modification of adverse agency determinations, only a small proportion of terminations result in requests for hearings." Gov. Br. 30, n. 12. In light of the interim harms and the subsidized dilatoriness of the very subsequent "fair hearing," this is not a case of flexibility of timing. The issue really is the availability and effectiveness of any opportunity to be heard. See *Goldberg,* Br. of Appellees 58-61.

When the due process question is measured in these terms, the necessity of maintaining assistance until a hearing is apparent. We believe this Court recognized in *Snaidach* v. *Family Finance Corp.,* 395 U.S. 337 (1969), the relevancy of the significance of the "property" to the individual about to be deprived of its enjoyment. The invalidation of ancient garnishment procedures was based on the impact of summary process as applied to wages, "a specialized type of property presenting distinct problems." 395 U.S. at 430. The Court noted that summary process "might well drive a wage-earning family to the wall." 395 U.S. at 341-42. This decision, we believe, reflected a line of cases in this Court requiring a high degree of procedural fairness where an adjudicatory determination threatens a shattering impact on an individual.[20] *Garfield* v. *Goldsby,*

[20] The Government's distinction between benefits without cost to the Government, such as broadcasting licenses, and Government revenues is equally unhelpful in determining whether there is an "extraordinary situation" warranting summary process. The Government's interest in the proper use and allocation of such publicly

211 U.S. 249 (1908); *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922); *Willner* v. *Comm. on Character and Fitness*, 373 U.S. 96 (1963).

V.

There is also no merit in the argument that summary revocation can be justified as a means of accurately allocating and limiting discretionary expenditures in the interest of all welfare recipients. While no stranger to defenses of welfare practices, *King* v. *Smith, supra; Shapiro* v. *Thompson*, 394 U.S. 618 (1969), this justification is particularly indefensible here in light of the very allocating function of a fair hearing and the total lack of evidence or argument to support the spectre of abuse.

We first must observe that the existing welfare system cannot claim accuracy in allocating aid as one of its virtues; the inaccuracies weigh heavily on the side of underpayment and arbitrary revocation. *Goldberg*, Br. of Appellees 38-39, 57; Gov. Br. 30-31. The arbitrary, indeed cavalier, revocations of aid documented in the instant cases are

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owned resources as the limited number of broadcasting channels or air traffic routes is certainly no less than its interest in public revenues. And these resources are certainly not property in any classic sense. See, *Blumenthal* v. *F.C.C.*, 318 F. 2d 276 (D.C. Cir. 1963). But that hardly tells us when, if ever, the Government may summarily seize a broadcasting license or an air traffic route. The constitutional question would not be changed if the Government issued licenses to the highest bidder, thereby involving "public revenues" as well as public resources. Cf. *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D.C. Cir. 1964). The "extraordinary situation" represented by *Phillips* v. *Commissioner*, 283 U.S. 589, does not support summary process in any situation affecting "public revenues." Largely based on history, this extraordinary situation refers to the prompt collection of a tax, where payment is in jeopardy and not revocation of statutory benefits. See generally, Reich, The New Property, 73 Yale L. J. 733 (1964).

not speculative; the denial of an effective hearing is not calculated to diminish this pattern of administrative arbitrariness. Speculative focus on the so-called "ineligible individual" must not obscure the documented and deeply embedded characteristics of the present system. Nor should the welter of statistics obscure the individuals and families in the instant cases, and the many others similarly situated, victims of the welfare system's long emphasis on saving money. They do not see the relaxation of constitutional safeguards as somehow in the interests of all or any welfare recipients.

Against the reality of these "thousands of personal tragedies behind the statistics of public assistance," as the City of New York puts it, *Goldberg*, Br. of Appellants 11, we have a speculative cost argument that finds no support in the regulatory view of H.E.W. or the view of New York State, which does not join the City in this appeal.[21] Nor, upon examination, is the speculation well founded.

The additional expenditures of a prior hearing are not delineated by the number of persons receiving public assistance, though all have a stake in the outcome of this case. Nor is it relevant that some welfare recipients, about 2% in all, have joined together to deal with grievances

[21] Other courts, familiar with the factors of local welfare administration, have reached a similar conclusion to that of the three-judge district court in *Goldberg* v. *Kelly*. *Machado* v. *Hackney*, 299 F. Supp. 644 (W.D. Texas 1969) (three-judge court); *Sims* v. *Juras*, Civ. No. 69-238 (D. Ore. August 21, 1969) (three-judge court); *Robertson* v. *Born*, Civ. No. 51364 (N.D. Calif. June 12, 1969); *Bailey* v. *Engleman*, Civ. No. 654-69 (D.N.J. Sept. 22, 1969); *Miller* v. *Zoeller*, Civ. No. 69-C-2 (W.D. Wisc. Jan. 20, 1969) (temporary restraining order); *Coleman* v. *Ott*, Civ. No. 68-1169-C (D. Mass. Jan. 1969) (stipulation of dismissal on condition that state adopt prior hearing procedure as outlined by the district court in *Goldberg* v. *Kelly*).

collectively. They do not petition for a joint or mass termination hearing, and denial of a specific grant or indeed adjustment of assistance is not comparable to withdrawal of a bi-weekly subsistence grant. It is also incorrect to infer the burdens from the gross number of cases terminated. By hypothesis, we deal here with *contested* initial decisions to withdraw aid, where the recipient, previously found eligible, sufficiently believes that circumstances have not changed to contest the caseworker's assessment in a hearing.

Experience in states affording a prior hearing before cutoff leaves no doubt that the number of persons who do pursue the hearing is limited, indeed disturbingly so in light of recognized rates of erroneous terminations. New York City is assuredly illustrative, with the largest number of AFDC recipients in the country, a recipient population relatively more aware of their legal rights, and with greater access to legal assistance, an excess of administrative problems and errors, and a high rate of terminations monthly. The overall figures indicate that from January 20, 1969 to May 30, 1969, 1014[22] persons out of over 60,000[23] terminations requested a prior hearing, and that approximately 51 percent of these persons prevailed in that hearing. Indeed this reversal rate would pass muster even under the Government's test of whether more "eligible" than "ineligible" persons request a hearing. The experience in California, Washington, D.C., and Massachusetts is not to the contrary.

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[22] New York City Department of Social Services, Review Section Reports for Quarter Ending March 31, 1969, and Months Ending April 30, 1969 and May 31, 1969.

[23] New York City Department of Social Services Monthly Statistical Report, May 1969, p. 10.

Nor is Mississippi, the Government's chosen state, an exception to this experience. The so-called "200 per cent" increase in requests for termination hearings in 1968-1969 arises against the virtual non-use of the delayed hearing after termination (97 out of 22,776 terminations in 1967-68).[24] And the reference to the "77 per cent" "ineligible" persons requesting pre-termination hearings in Mississippi ignores the 46 requests (out of the 288 prior hearings in one year) "withdrawn" prior to the hearing, which almost always occurs upon reinstatement by the local agency. It also ignores the recent findings of the United States Commission on Civil Rights on welfare administration in that state:

> "When a hearing is finally granted, there is no assurance it will be fair. . . . The local decision is often assumed correct."[25]

The report concludes that

> "Despite the Social Security Act principle that eligible persons have a 'right to aid' and to a 'rule of law,' the Mississippi welfare system ignores this in practice."[26]

The argument then comes down to assertion, and indeed an assertion that we are to accept for many years, until the refuting experience is certain. Gov. Br. 27. It will readily be appreciated that the assertion is ultimately founded on the premise of distrust too long characteristic

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[24] Mississippi Department of Welfare, Division of Statistics.

[25] Welfare in Mississippi, A Report of the Mississippi State Advisory Committee to the United States Commission on Civil Rights 66 (February 1969).

[26] *Id.* at 81-82.

of welfare administration. As the Government openly puts it, "if payments are continued pending 'fair hearing' there will be more requests for such hearings, and more payments will be made to ineligible individuals." Gov. Br. 26-27. We have already argued that this premise is both unfounded and impermissible where, as here, it results in the denial of any effective opportunity to be heard. *Goldberg*, Br. of Appellees 56-61.

We stress here only that welfare agencies, rather more than most, possess ample authority and flexibility both to deal with abuses and to minimize the costs and inconveniences of fair process. Civil remedies in the form of recovery provisions for overpayments frequently are invoked[27] (and valid terminations are usually based on resources or income). Criminal sanctions exist and are used for misrepresentation of eligibility and knowing improper retention of benefits. The nature of eligibility disputes, being limited to a single issue or two, and a highly localized system of administration allows unusual expedition in the scheduling and holding of a welfare hearing. The pattern of 3-6 month delays, sometimes longer, in the post-termination "fair hearing" process cannot be explained by the practicalities of administration, as can be seen in the revised two week pattern in those states now continuing aid pending a hearing.[28] Although the welfare system is not

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[27] See Graham, Public Assistance: The Right to Receive; The Obligation to Repay, 43 N.Y.U.L. Rev. 451 (1968).

[28] Mississippi, Manual Sec. F., pp. 6101-6103 (fair hearing, 20 days); Washington, D.C., Handbook of Public Assistance Policies and Procedures (HPA-II) BR 1.1, III, Sec. 17 (fair hearing, 15 days); New York State, Letter of Commissioner, Department of Social Services, to Local Commissioners, *Goldberg*, Br. of Appellees 92 at 95 (local agency hearing, two weeks); New York City Department of Social Services, Procedure No. 69-7 (January 15, 1969) I(4)(a) (14 days).

known for the exercise of flexibility, the flexibility assuredly is there, and the minimal guarantees of due process do not impose "fixed molds" precluding its exercise. The application of accepted norms of due process to welfare terminations does not impose costs or burdens in excess of those inherent in any system of Government that has sufficient regard for the rights of individuals to provide an opportunity to be heard in making adjudicatory decisions affecting their vital interests.

In the final analysis, the Government's brief puts before this Court the questions posed by Professor Harry Jones over a decade ago in "The Rule of Law in the Welfare State," 58 Colum. L. Rev. 143, 156 (1958):

> "In an era when rights are mass produced, can the quality of their protection against arbitrary official action be as high as the quality of the protection afforded in the past to traditional legal rights less numerous and less widely dispersed among the members of society? . . . Is it beyond hope that this vast new company of officials can, in time, develop a tradition of decision worthy of being called, in Pound's fine phrase, an 'ethos of adjudication?' "

We submit the Government's answer to these questions is both untimely and incorrect.

CONCLUSION

The judgment of the District Court in No. 62, *Goldberg* v. *Kelly*, should be affirmed.[29] The judgment of the District Court in No. 14, *Wheeler* v. *Montgomery*, should be reversed.

Respectfully submitted,

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[29] The Government's request that the judgment in No. 62 be affirmed with modification of the conditions appears to be inadvertent error. The Government provides no legal grounds in its brief to continue the preliminary injunction against the use of option (b), the New York City procedure, in either the AFDC or Home Relief Programs.

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